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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

WILLY DREYFUS,

Petitioner,

v.

AUGUST VON FINCK, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Willy Dreyfus, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 6, 1976.

Opinions Below

The opinion of the court of appeals, which is not yet reported, is set out in the Appendix hereto, pp. 31a-41a. The opinion of the district court, dated May 20, 1974, which is not reported, is set out in the Appendix, pp. 1a-12a. The opinion of the district court, dated January 3, 1975, which is not reported, is set out in the Appendix, pp. 13a-29a. The decision of the United States Court of Restitution Appeals, dated May 10, 1950, is reported at 1 Court of Restitution Appeals, Opinion No. 24 (1951). The decision of the United States Court of Restitution

Appeals, dated March 7, 1951, is reported at 2 Court of Restitution Appeals, Opinion No. 68 (1952).

Jurisdiction

The judgment of the Court of Appeals was entered on April 6, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Does the complaint in this action state a claim upon which relief can be granted, (a) under 28 U.S.C. §§ 1331 and 1350 with respect to the alleged treaties of the United States and the Law of Nations, or (b) under 28 U.S.C. § 1331 with respect to Military Law 59 promulgated by the American Military Government for occupied Germany?

Treaties and Statutory Provisions Involved

Section 1350, 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Section 1331(a), 28 U.S.C., provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Article I of Military Law 59, promulgated by the United States Military Government for Germany on November 10, 1947, provides:

> 1. It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who where wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. For the purpose of this Law deprivation of property for reasons of nationality shall not include measures which under recognized rules of international law are usually permissible against property of nationals of enemy countries.
>
> 2. Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.

Article 46 of the Hague Convention, 36 Stat. 2277, provides:

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.

Statement of the Case

Petitioner is a Jew and a citizen of Switzerland. Prior to 1937 petitioner, who was then a national of both Germany and Switzerland, resided in Germany where he was the proprietor of a major bank in Berlin. In that year certain laws were promulgated making it illegal for Jews to own banks and various other business. Shortly thereafter petitioner sold his bank to a firm owned by the respondent. The complaint alleges that the sale was made under duress and that the purchase price was as a consequence more than one and one-half million dollars below the actual value of the firm. The complaint further alleges that such confiscation of Jewish property was part of the Nazi plans and preparations to wage aggressive war in violation of various treaties, and that the defendants were involved in those plans and preparations. After the loss of his bank petitioner fled to Switzerland.

Following World War II, petitioner sought additional compensation, and, in 1948, a settlement was agreed upon. This settlement, however, was never consummated, allegedly because of a wrongful repudiation by the defendants. In November, 1947, the American Military Government in Germany promulgated Military Law 59, which required restitution or compensation for property forcibly transferred from Jews under the Nazi regime. In 1948 petitioner commenced a proceeding in the courts authorized by Military Law 59, seeking compensation or enforcement of the 1948 settlement. In 1950 the Court of Restitution Appeals, whose members were American nationals, directed that the 1948 settlement be enforced absent certain unlikely circumstances. On remand to the lower court ("Restitution Chamber") in Munich, however, that court refused to obey the appellate decision and a second appeal

was taken. At the 1951 oral argument in the Court of Restitution Appeals which followed, however, counsel for petitioner announced that he had agreed to a new settlement of case, and the case was dismissed on the basis of this representation. Petitioner maintains that this 1951 settlement was entered into by counsel without his knowledge or approval, that it was fraudulent in nature, and that the amount of the 1951 settlement was only a fraction of the 1948 settlement whose enforcement was virtually certain.

On December 12, 1973, petitioner commenced this action in the United States District Court for the Southern District of New York, and shortly thereafter obtained an order attaching certain assets owned by the defendants in New York City. Jurisdiction was alleged to exist under 28 U.S.C. §§ 1331 and 1350. On May 20, 1974, the district court granted a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Pp. 1a-12a. Shortly thereafter the district court set the matter down for reargument and on January 3, 1975, issued a second opinion which also concluded that the action should be dismissed for failure to state a claim on which relief could be granted. On April 6, 1976, the court of appeals affirmed that dismissal.

Reasons for Granting the Writ

The Nazi policies of persecution and aggression, from which this action arises, were the most tragic and cataclysmic events of this century for the world at large and for the United States. In the World War that those policies precipitated, millions of American men fought, hundreds of thousands of American men died, and tens of billions of American dollars were expended. For almost a decade following the conclusion of that war, the United

States occupied a substantial portion of Germany and administered a massive denazification program to eliminate root and branch the ideology which had threatened the very existence of this country. American officials undertook in a variety of ways to make whole the victims of the Third Reich, adopting Military Law 59 to force Germans who had expropriated the property of Jews to compensate those few victims who had survived the "Final Solution."

This is one of the cases in which American military authorities undertook to fashion appropriate relief for conduct which had violated both Military Law 59 and the most universal of human moral standards. Petitioner alleges that, at a point in the history of that case when the American authorities were virtually certain to award him judgment, the attorneys for the litigants in Germany committed a fraud upon both petitioner and the all-American Court of Restitution Appeals by announcing to the court a "settlement" to which petitioner had never agreed and of which he had never been told.

The Second Circuit, however, concluded that these events were a purely internal German affair. Comparing the events of 1933-1945 to the negligent operation of a boat or a refusal to pay a life insurance policy, the court held that they involved no violations of the law of nations. Pp. 40a-41a. Although aware that the forums created by Military Law 59 no longer exist, the Second Circuit held that they were the exclusive and proper forum in which this action must be pursued. Pp. 34a-37a.

Underlying the opinion of the court below was its assumption that where a defendant has been party to, or benefitted from, a violation of the Laws of Nations or of a United States treaty, an American court has no business enforcing such laws or treaties.

> [E]ven where a treaty is self-executing, federal jurisdiction under §1331 will not lie where it is not provided for in the treaty. P. 38a.
>
> Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights. P. 40a.

The Second Circuit apparently believed that, when violations of such international obligations occur and individuals are injured, the relief in each case should be negotiated by the Department of State and enforced by the Department of Defense.

This decision as to the enforceability of American international agreements comes at a time when such agreements, touching directly upon a variety of basic human rights, are increasing in both number and scope. Expanding on the provisions of the United Nations Declaration on Human Rights, the Helsinki Treaty of 1975 embodies a plethora of undertakings by the signatories to respect and protect individual civil and political liberties. As American public concern with violations of human rights continues to rise, legislation such as the Jackson Amendment is certain to become increasingly common. These salutary trends represent an effort to subject international disputes regarding individual rights to the rule of law, rather than dangerous and uncertain *ad hoc* confrontations between heavily armed superpowers. The decision below poses a clear threat to this new approach in international relations. The refusal of United States courts to enforce American treaty obligations or the accepted principles of international law, or to enforce regulations and orders promulgated by the executive branch and touching on the interests of foreigners, will inevitably lead to suspicions as to the sincerity of American commitments to those obligations, principles and rules.

It was to avoid precisely this problem that the Constitutional Convention adopted clause 2 of Article VI, providing that "all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." Hamilton explained in The Federalist:

> The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . arising upon treaties and the laws of nations, . . .[1]

Uppermost in the minds of the Convention was the refusal of the states to comply with the provisions of the peace treaties with England which had forbidden confiscation of Tory property.[2] Invoking Article VI in 1816, this Court affirmed the enforceability of those treaties in *Martin* v. *Hunter's Lessee,* 1 Wheat (14 U.S.) 303. The Sec-

[1] The Federalist, No. 80.

[2] Provisional Treaty of Peace, Article VI (1782); Definitive Treaty of Peace, Article VI (1783). These treaty obligations "were grossly disregarded by the States under the Confederation. They were deemed by the States not as laws, but like requisitions of mere moral obligations, and dependent upon the good-will of the States for their execution. Congress, indeed, remonstrated against this construction, as unfounded in principle and justice. But their voice was not heard." Story, Commentaries on the Constitution, Book IV, Ch. XLII, p. 606. Nearly all the states enacted statutes which violated these treaties and appeals to the state legislatures to repeal the statutes were ineffectual. Hart and Wechsler, *The Federal Courts & The Federal System,* 21 (1953).

ond Circuit concluded, however, that no treaty could be enforced in the federal courts unless the treaty itself contained an express grant of jurisdiction to that effect. No such grant, or any other reference to court enforcement, is to be found in the treaties in *Martin,* in any of the treaties signed in the early years of the Constitution,[3] or in virtually any other treaty adhered to by the United States or previously enforced by this Court.[4]

The court below expressly acknowledged that expropriation of the sort alleged would be a violation of the Law of Nations if the property had belonged to a foreign national. P. 41a. The court asserted that "plaintiff was a citizen and resident of Germany at the time of defendants' alleged wrongdoing." P. 41a. In fact, at the time he lost his property, petitioner, who was also a Swiss national, was in the process of being stripped of his German citizenship because he was a Jew.[5] It is unreasonable to suggest that the Nazi persecution of millions of German Jews, which entailed a systematic denial of the benefits of citizenship and ultimately of citizenship itself, was an entirely internal matter because the victims were all German citizens.

[3] See e.g. Treaty of Amity and Commerce Between the United States and France, Article III, IV, X, XX, XXIII (1776); Treaty of Amity and Commerce Between King of Prussia and the United States Article IV, XII, XXIII (1785); Treaty of Peace and Friendship Between the United States and Morocco, Article XVII, XXIV (1787); Treaty of Peace and Amity Between Algiers and the United States, Articles II, XIV, XVII (1795); Treaty of Friendship Between United States and Spain, Articles XIII, XV, XXII (1795).

[4] *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974); *Asakura* v. *Seattle,* 265 U.S. 332 (1924); *McClanahan* v. *State Tax Commission,* 411 U.S. 164 (1973); *Corbett* v. *Sergios,* 381 U.S. 187 (1961).

[5] 7 Encyclopedia Judaica, 489 (1971).

The Second Circuit did not deny that the expropriation alleged in the complaint constituted a violation of Military Law 59. It is difficult to see how the enforcement forum established by that law can be regarded as the appropriate and exclusive remedy when that forum no longer exists and the complaint alleges that a fraud was committed on the Military Law 59 courts. The decision below held that Military Law 59 was not a law of the United States because it was not promulgated pursuant to a statute. Pp. 36a-37a. In fact the Law was only promulgated after, and pursuant to, repeated congressional authorizations of military administration of occupied Germany.[6] Even in the absence of such statutory authorization, the President and his delegees have authority under Article II to issue regulations such as that in this case. The suggestion below that such regulations are not "laws of the United States", although they clearly have the force of law and often provide serious penalties for disobedience, is squarely inconsistent with the general view of section 1331 articulated by this Court in *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98-101 (1972) and *Romero* v. *International Terminal Co.*, 358 U.S. 354, 393 (1959).

[6] See, e.g., 59 Stat. 404 (1945); 61 Stat. 71, 569, 625, 943 (1947).

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDICES

Opinion of District Court dated May 20, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5271-CLB

WILLY DREYFUS,

Plaintiff,

—against—

AUGUST VON FINCK, Munich, Germany, and MERCK, FINCK & Co., Munich, Germany,

Defendants.

MEMORANDUM

BRIEANT, *J.*

By notice of motion dated March 11, 1974, heard on May 1, 1974, defendants moved for an order pursuant to Rule 12(b), F.R.Civ.P., vacating service and dismissing the complaint on four separate numbered grounds. Of these, No. 4 was waived at the hearing, and Nos. 2 and 3 were withdrawn without prejudice to renew after the completion of discovery in the event that the Court fails to dismiss the complaint on the first numbered ground, i.e., lack of subject matter jurisdiction.

This is an action between aliens. Plaintiff is a Swiss citizen, born in Germany, and originally a national of that country. Defendants are a West German national, and a West German partnership or business entity. The complaint was filed December 12, 1973. On January 15, 1974, after an *ex parte* hearing before me, plaintiff obtained an order of attachment in the amount of $150,000.00, which

was levied upon bank accounts of defendants maintained in New York. The attachment was vacated by consent order dated February 5, 1974, after defendants posted a bond in that amount. Our jurisdiction over these defendants is probably *quasi in rem,* and extending only to the amount of the attachment pursuant to New York CPLR §6201(1) as limited by Rule 320(c)(1) thereof, made applicable to this Court by Rule 4(e)(2), F.R.Civ.P., although plaintiff now contends that defendants are international bankers who participate in the State of New York in public offerings of securities with sufficient regularity, as underwriters or members of a selling syndicate, so as to constitute presence in this District and render them amenable to personal jurisdiction by service in West Germany, pursuant to §301 New York CPLR, also applicable here pursuant to Rule 4(f), F.R.Civ.P., a contention defendants dispute.

The plaintiff seeks to recover damages for tortious conduct, and also to enforce an agreement or stipulation made in August, 1948, in settlement thereof. If subject matter jurisdiction is sustained as to the tort claim, we would have pendent jurisdiction over the claim to enforce the stipulation or agreement of settlement.

As required by Rule 8(a)(1), F.R.Civ.P., plaintiff pleads that jurisdiction is founded on 28 U.S.C. §§1332 and 1350, and:

> ". . . is also founded on 28 U.S.C. §1331 and §1350 in that part of the wrong complained of happened during, and as a result of, the occupation of Germany by the United States pursuant to the Four Power Occupation Agreement to which the United States was a signatory and also because they are acts which constituted violations of various treaties to which the United States and Germany were signatories, including, *inter alia,* The Hague Convention, Versailles Treaty, and the Kellogg-Briand Pact. The amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars." (Complaint, ¶4)

At the hearing on the motion, it was conceded that 28 U.S.C. §1332 could not be relied on. There is no diversity. The pleading shows on its face that all parties are aliens.

Section 1350 of Title 28, also relied on, reads as follows:

> "Alien's Action for Tort
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Likewise applicable is §1331(a), which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, . . . and arises under the Constitution, laws, or treaties of the United States."

There is federal subject matter jurisdiction, within the rule of *Bell* v. *Hood,* 327 U.S. 678 (1946). That is an issue which must be resolved by looking to "the way the complaint is drawn, to see if it is drawn so as to claim a right to recover under" treaties of the United States. *Bell* v. *Hood, supra* at 681. "[T]he party who brings a suit is master to decide what law he will rely upon." *Bell* v. *Hood, supra,* at 681, quoted from *The Fair* v. *Kohler*

Die Co., 228 U.S. 22, 25. *Bell* v. *Hood* holds directly that where a complaint is so drawn, the federal court must entertain the suit, because "the Court must assume jurisdiction to decide whether the allegations state a [claim] on which the Court can grant relief" (*ibid.*, p. 682). Whether the complaint states a claim must be decided after, not before, the Court has taken jurisdiction over the subject matter of the controversy. This District Court has subject matter jurisdiction, because the right of plaintiff to recover under his complaint will be sustained if the treaties of the United States are given one construction, and will be defeated if they are given another.

In the absence of a clear facial showing of subject matter jurisdiction, we would not have granted the order of attachment. What has occurred is that defendants have mistaken their remedy. The true thrust of their argument is directed towards whether the complaint pleads a tort claim arising under the treaties, upon which relief can be granted. As the issues have been briefed and argued fully, the Court will treat the motion as having ben brought under Rule 12(b)(6), F.R.Civ.P.

We turn now to the complaint. Plaintiff pleads that in 1938, and prior thereto, he was a principal owner of J. Dreyfus & Co., a private banking firm, located in Berlin, Germany, and founded by his family in 1868. He tells us that (¶7):

> ". . . plaintiff, as a result of collective Nazi perfidy, was [in January 1938] forced against his will, intent and desire to transfer at a completely unfair, illegal, inadequate and inequitable price the banking firm of J. Dreyfus & Co. and all of plaintiff's interest therein to defendants."

This inequitable transaction was forced upon him (¶8)

> "because plaintiff was Jewish and under the Nürnberg Laws and other decrees of Hitler could no longer own or operate a bank in Germany, . . . [nor] receive fair, adequate and appropriate compensation [for a sale thereof to defendants]."

Although defendants were apparently acting in a private capacity, it is adequately pleaded that they tortiously and inequitably, unfairly, illegally and wrongfully acquired his banking assets. We are told (¶11) that this conduct by defendants took place

> "pursuant to said Nürnberg Laws and decrees of Hitler which decrees and laws were illegal and contrary to the law of nations, treaties to which the United States and Germany were signatories, and humanity, and were part of the scheme to wage war against humanity and most of the nations of the civilized world."

It is further pleaded that following World War II, the parties negotiated an agreement of settlement which defendants refused to honor, and in fact, renounced.

That part of the complaint based on tort is analogous factually and legally to the claim pleaded in *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772, and also in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375. As we are informed by Judge Learned Hand (*Van Heyghen, supra*, pp. 248-9) acts of the sort complained of on the part of defendants here were, at the time they are alleged to have taken place, and prior to December 1938 "unlawful under the laws of the Reich itself," the place of the tort.

They were unlawful here, whether for convenience referred to as fraud and deceit, intentional interference with or trespass to property, constructive duress, and overreaching, or however may be most convenient for purposes of discussion.

It is not clear that this tort is actionable in an American court. The *Bernstein* litigation of course, did not reach the question of whether such a claim arises under a treaty, or because of acts committed in violation of the law of nations within the meaning of 28 U.S.C. §1350 relied on here. The latter issue did not arise in the *Bernstein* cases. There, diversity of citizenship was present. See 173 F.2d 78.

In *Van Heyghen,* the complaint was dismissed for failure to state a claim. We refrain from quoting the reasoning; to do so would require us to incorporate the entire opinion. Later, this Circuit expressed the same viewpoint in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.,* 173 F.2d 71 (1949), modified, 210 F.2d 375. Thereafter, a letter dated April 13, 1949, of the sort since known to scholars as a "Bernstein letter" was issued by the U. S. Department of State, quoted in relevant part in *Bernstein* v. *N.V. Nederlandsche-Amerikaanishe, etc.,* 210 F.2d 375, 376 (2d Cir. 1954). Based on the letter, "claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion or duress as a result of Nazi prosecution in Germany" could be litigated.

The "Bernstein letter" was general as to its terms, and would be applicable in New York state court, or in this Court in a diversity case, but for subsequent expressions by the Supreme Court indicative of its present view that the last *Bernstein* case was decided incorrectly, and the "letter" a nullity.

The question was first considered in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 420 (1964) in which the Court said:

> "This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now."

Recently in *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972) several opinions were delivered, all referring to *Bernstein.* In that case, Mr. Justice Rehnquist, writing only for himself, the Chief Justice and Justice White (on this point) approved *Bernstein,* in reversing this Circuit (442 F.2d 530). But Mr. Justice Douglas, concurring, considered *Bernstein* inapplicable, and by implication, correct, while Mr. Justice Powell disagreed, (p. 773) and dissenters, Justices Brennan, Stewart, Marshall and Blackmun wrote (p. 776):

> "The Court, nevertheless, affirms the Court of Appeals' rejection of the '*Bernstein*' exception. Four of us in this opinion unequivocally take that step, as do Mr. Justice Douglas and Mr. Justice Powell in their separate opinions concurring in the result or judgment."

Even if the dissenters in *First National City Bank, supra,* misinterpret the opinion of Mr. Justice Douglas, it is now clear that at least five of the Justices reject that case. Thus, the law in a like case is returned to the rule enunciated by Judge Learned Hand in the first *Bernstein* case against *Van Heyghen, supra,* and accordingly, plaintiff here fails to state a claim, as did plaintiff in *Van Heyghen.*

We now turn to the secondary question, whether a claim is stated arising under treaties of the United States. Plaintiff has not called our attention to any particular provisions

of any treaties to which the United States and Germany were signatories, which expressly create any private causes of action, for tort or otherwise. The United States is not a signatory to the Versailles Treaty referred to in the complaint, although it appropriated any benefits flowing to itself by its separate peace treaty with Germany of August 25, 1921 (¶5). The Hague Convention and the Kellogg-Briand Pact renouncing war as an instrument of international policy were the basis for imposing criminal sanctions on German war criminals, tried following World War II, but no case has been cited to our attention in which such treaties were relied upon as giving rise to a private cause of action pursuant to which this Court would have jurisdiction under §1350 of Title 28 U.S.C., or otherwise.

Plaintiff asks us to hold that this Court may imply a private cause of action in his favor under these treaties, as well as the Four Power Occupation Agreement, to which the United States was signatory (which was in effect at the time of the making of the 1948 contract of settlement, but not at the time of the tortious conduct in 1938). Only cases arising under the federal securities laws are cited in support of this invitation to exercise our judicial power in such grandiose fashion.

We find no authority, and none is cited to us in which a private cause of action arising out of extraterritorial acts, but justiciable in the federal courts, has been asserted successfully as arising by implication out of any international treaty.

When the international lawyers and diplomats desire to create a private right arising out of a treaty, they know how to do so. The classic example, of course, is the Warsaw Convention, by which private causes of action were created by express language of the Convention itself, against inter-

national air carriers for the benefit of passengers and shippers. See Chapter Three thereof, and particularly Article 28(1) which fixes the venue for the private action.

The learning with respect to international compacts differs from the interpretation of legislative intent followed by our courts in implying private rights of action under remedial statutes such as the federal securities laws. An accepted principle of international law seems to be that to create a private right or obligation, the treaty, must, as in the case of the Warsaw Convention, express a clear intent so to do.

For example, in *Pauling* v. *McElroy*, 164 F.Supp. 390 (D.C.D.C. 1958), *aff'd* 278 F.2d 252, *cert. denied* 364 U.S. 835, the District Court considered it "doubtful" that the Court had jurisdiction, under 28 U.S.C. §1350, of a claim asserted by aliens, resident in the Marshall Islands, aggrieved by a proposed nuclear weapons test, and implied they failed to state a claim. The Court held (p. 393):

> "[5] 4. The provisions of the Chapter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned."

See also *Filhiol* v. *Maurice*, 185 U.S. 108 (1902) in which the Court failed to imply a private cause of action arising out of the Fifth Amendment and the Treaty with France of October 21, 1803 (Louisiana Purchase). The Supreme Court there held (p. 111):

"Did it appear from plaintiffs' own statement that the case arose under the Constitution or a treaty of the United States? We do not think it did.

The Fifth Amendment prohibits the exercise of Federal power to deprive any person of property without due process of law, or to take private property for public use without just compensation; and the treaty of October 21, 1803, provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. Public Treaties, 200.

But no right, title, privilege or immunity was here asserted as derived from the Constitution or the treaty, as against these private individuals, who were impleaded as defendants, either specifically, or through averments that plaintiffs were ousted in violation of the treaty and of the Fifth Amendment, the provisions of which it was the duty of the Federal Government to observe.

The gravamen of the complaint was that plaintiffs' ancestor had a perfect title, to which they had succeeded, and the appropriate remedy for illegal invasion of the right of possession was sought . . . and so far as defendants were concerned, it was not charged that they took possession by direction of the Government, and plaintiffs set up no more than a wrongful ouster by merely private persons, remediable in the ordinary course, and in the proper tribunals."

In *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd.* 311 U.S. 470 (1941) the Court of Appeals held as follows with respect to private disputes arising out of German reparations for the "Black

Tom" explosion of 1916, and related events, payable under the Treaty with Germany of August 25, 1921 (p. 470):

> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."

In *Z. & F. Assets,* the complaint was dismissed because no such express provisions were found in the treaty. See authorities collected in fn.27, 114 F.2d at 471. *Cf. Khedivial Line S.A.E.* v. *Seafarers' Int'l Union,* 278 F.2d 49 (2d Cir. 1960) [*dictum,* as no applicable treaty existed, and the acts complained of occurred in the United States]; *King Features Synd.* v. *Valley Broadcasting Co.,* 43 F.Supp. 137, 138 (N.D. Tex. 1942).

There is no substantive right to recover for the claimed tort *expressed* in plaintiff's favor in any treaty provision to which the United States is a party. We decline to imply such a right. Accordingly, the complaint fails to state a tort claim [within 28 U.S.C. §1350 or otherwise] upon which relief can be granted. It follows that there is no

Opinion of District Court dated May 20, 1974

pendent jurisdiction to entertain the contract claim, based on the stipulation or agreement or settlement made in 1948.

The complaint is, for the foregoing reasons, dismissed.

Settle a final Judgment on notice, which shall provide that the bond to secure our order of February 5, 1974 vacating the attachment shall not be discharged or exonerated pending appeal.

Dated: New York, New York
May 20, 1974

/s/ CHARLES L. BRIEANT, JR.
Charles L. Brieant, Jr.
U.S.D.J.

Opinion of District Court dated January 2, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5271-CLB

WILLY DREYFUS,

Plaintiff,

—against—

AUGUST VON FINCK, Munich, Germany, and MERCK, FINCK & Co., Munich, Germany,

Defendants.

MEMORANDUM

BRIEANT, *J.*

By memorandum opinion dated May 20, 1974, the complaint in this action was dismissed, pursuant to Rule 12(b), F.R.Civ.P., for failure to state a claim upon which relief could be granted. Briefly, we held that although this Court had subject matter jurisdiction, and *in rem* jurisdiction over the funds of the defendant which had been attached, the complaint failed to state a claim, first because the Act of State doctrine precluded the Court from inquiring into the alleged forced transfer in Nazi Germany in 1938 of plaintiff's property to defendant, and second, because no private right of action exists under the treaties upon which plaintiff relied, nor could the Court imply such a right of action.

Plaintiff moved for reargument pursuant to Rule 9(m) of the General Rules of this Court, and by memorandum

endorsement dated June 26, 1974, the motion was granted. The May 20, 1974 decision was modified on reargument to allow plaintiff to file an amended complaint alleging with particularity the provisions of the treaties upon which plaintiff relies. An amended complaint was filed on July 24, 1974. By notice of motion filed September 11, 1974, defendants moved to dismiss the amended complaint, for failure to state claim, and upon additional grounds which, by agreement of counsel are to be deferred pending resolution of the Rule 12(b)(6) motion.

I

Familiarity with our prior opinion is assumed. The original complaint alleged, as does the amended pleading, that in 1938 plaintiff, then residing in Germany, was forced, because he was Jewish, to transfer his banking business to defendants for an inadequate consideration, and that this action was part of Hitler's scheme to wage war in violation of the Hague Convention, the Versailles Treaty, the Kellogg-Briand Pact, and the law of nations.

In 1948, the parties negotiated an agreement under which compensation was to be paid to plaintiff. Plaintiff alleges (Amended Complaint, ¶¶16 and 17) that defendants tortiously breached and renounced that agreement, and that the tortious and wrongful renunciation of the 1948 settlement agreement violated the Four Power Occupation Agreement in some manner not specified.

The so-called Four Power Occupation Agreement ("Agreement on Central Machinery in Germany"), 5 U.S.T. 2062, however, is a mere allocation of "housekeeping" duties within military zones providing for the administration of sectors of Germany by the four victorious powers. There is no mention therein of injuries to private parties,

nor of remedies for such injuries, nor does the Agreement itself provide for reparations, restitutions or tribunals to accomplish reparations. There is, therefore, no cause of action for the benefit of private parties expressed in that Agreement, nor is there any provision upon which to predicate an implied right of action in this Court.

The amended complaint charges that "[b]eginning on or about January, 1932, and thereafter, Adolph Hitler and other political, governmental and business leaders of the German Third Reich conspired and determined to make aggressive war" (Amended Complaint, ¶8) in violation of the treaties set forth in both the original complaint and the amended complaint, and in violation of international law, and that as

> "part and parcel of and crucial to the successful execution of such scheme, Hitler and the other said leaders adopted the policy of making it impossible for Jews to own economic assets including banking firms in Germany. Such scheme, in addition, included policies which would eliminate the Jewish people from Germany." (Amended Complaint, ¶ 8)

Plaintiff does not accuse the individual defendant, nor anyone associated with the corporate defendant of having been among those business leaders who conspired directly with Hitler or his cohorts. Upon the assertion that the "conduct complained of herein was held at Nurnberg to constitute criminal violations of the treaties relied on herein and the law of nations" (Plaintiff's Memorandum Contra Defendants' Motion to Dismiss Amended Complaint, p. 33), plaintiff constructs the argument that these criminal violations give rise to an implied private right

of action in this Court, citing cases arising under the federal securities laws and similar statutes.

The vicious crimes of Hitler, and the iniquitous treatment by his regime of Jews are well-documented matters of history, properly condemned at Nurnberg, but unless the defendants in this case are responsible for the crimes of that infamous regime, plaintiff's argument must fail. Although plaintiff relates the forced sale of his business to the entire Nazi war effort and its religious persecutions, the core of his injury is the forced sale itself, and the Nurnberg Tribunal held this particular kind of injury was not a war crime.

After the first and best known Nurnberg trial, by Executive Order No. 9679, January 16, 1946, President Truman conferred on the Representative of the United States and its Chief of Counsel, "authority to proceed . . . in proper cases, against other Axis adherents." Whiteman, *Vol. 11 Digest of International Law* (1968), p. 911. Twelve such trials were held during the years 1946 through 1948. Three and part of a fourth trial were concerned with the criminal responsibility of leading German private businessmen. With regard to *United States* v. *Friedrich Flick*, Case No. 5, *op. cit.* p. 912, it was reported that:

> "The prosecution's effort . . . to convict three of the defendants of crimes against humanity committed before the war, was totally unsuccessful. The court refused to take jurisdiction, on the ground that crimes committed before and wholly unconnected with the war were not encompassed by Law No. 10. It added, furthermore, that crimes against humanity are 'only such as affect the life and liberty of the oppressed peoples,' and that 'compulsory taking of industrial property, however reprehensible, is not in that category.' Consequently, had it assumed jurisdiction of the charge, the Tribunal would have been unwilling to decide 'that a person becomes guilty of a crime against humanity merely by asserting antisemitic pressure to procure by purchase or through state expropriation industrial property owned by Jews.'"

Even applying to treaties, for purposes of argument, the rule that violations of a criminal statute may give rise to a private cause of action in a proper case, no such cause exists here in view of the aforementioned determination of the Nurnberg Tribunal.

In accordance with this Court's prior direction, plaintiff alleged in his amended complaint specific sections of treaties he claims defendants violated. These include the preamble to The Hague Treaty of October 18, 1907, and Articles 1, 46 and 41 thereof; the entire Kellogg-Briand Pact; and Articles 124, 227-230, 231, and 300 of the Treaty of Versailles "made applicable to the United States by the 1921 U. S.-Germany Treaty of Berlin;" and "the law of nations and universally generally accepted rules of international law." (Amended Complaint, ¶ 11).

The preamble to The Hague Convention of the Laws and Customs of War on Land (36 Stat. 2277) states that the Convention is "intended to serve as a general rule of conduct for the belligerents . . . in their relations with inhabitants" of countries with which they are at war. Articles 1, 41 and 46 read as follows:

> "Article 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention."

"Article 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained."

"Article 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
Private property cannot be confiscated."

Article 40, not cited by the plaintiff, sheds some light on the use and meaning of the word "party" in Article 41, which is equivalent to the word "state." Article 40 provides that a violation of the Convention by one party "gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately." Thus, it is states, not individuals, who may demand punishment or compensation under Article 41. This is in accordance with the general principle that only states have rights under international law. "[U]nder established international diplomatic and legal procedures persons have generally not had standing to initiate their own claims." *Restatement (Second) of Foreign Relations*, p. 526 (1965). This statement is made with regard to the rights of aliens, with which it is apparent the Hague Convention is concerned. The Hague Convention does not presume to regulate the rights of nationals against their own governments, but is an attempt to protect the rights of foreign inhabitants of invaded countries.

The Kellogg-Briand Pact (46 Stat. 2343) has two sections which bear on the case. Article 1 declares that the contracting parties "condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another," and Article 2 states that settlement of disputes shall be by "pacific means." Obviously, a treaty stated in such broad and precatory terms is at most *a compact among nations*, not purporting to confer any rights upon individuals.

The sections of the Treaty of Versailles cited by plaintiff (to which the United States was not a signatory) provide that Germany is to pay reparations to French nationals (Article 124), that the Allies may prosecute German citizens for war crimes with the cooperation of the German government (Articles 227-230), that Germany accepts responsibility for damage to Allied countries and their nationals (Article 231), and that Allied nationals who were damaged by acts done in Germany may file complaints in an arbitral tribunal (Article 300). None of these articles purports to intervene on behalf of German nationals who have claims against their own government.

We, therefore, adhere to our original decision that

"There is no substantive right to recover for the claimed tort *expressed* in plaintiff's favor in any treaty provision to which the United States is a party." (Memorandum Decision, May 20, 1974, p. 15)

The Court also adheres to its decision that it will not imply a private right of action by analogy to cases arising under the federal securities laws or similar internal regulatory statutes of the United States. As we pointed out in our May 20, 1974 decision, private rights of action must be created by express treaty language, as was done in the Warsaw Convention. See *Restatement (Second) of Foreign Relations*, §1, Comment f and §115, Comment e (1965);[1] *Pauling* v. *McElroy*, 164 F.Supp. 390 D.D.C. 1958, *aff'd*,

278 F.2d 252, *cert. denied*, 364 U.S. 835; *Filhiol* v. *Maurice*, 185 U.S. 108 (1902); *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F.2d 464 (D.C. Cir. 1940), *aff'd*, 311 U.S. 479 (1941). Accordingly, the amended complaint also fails to state a tort claim under 28 U.S.C. §1350, or otherwise, upon which relief can be granted, and there is no pendent jurisdiction over the contract claim.

II

The alternative ground on which the original complaint was dismissed was that the Act of State doctrine prevents this Court from inquiring into official acts of the German government done within its own territory. Plaintiff's counsel has made a scholarly argument in support of the position that the doctrine is not applicable here, either because the so-called "Bernstein exception" applies, *or* because this case does not meet the criteria set by the Supreme Court in two recent cases in which it discussed the doctrine (*Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) and *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 [1972]), mentioned in this Court's May 20, 1974 opinion. We previously noted that plaintiff's tort claim

> "is analogous factually and legally to the claim pleaded in *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. denied* 332 U.S. 772, and also in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375. As we are informed by Judge Learned Hand (*Van Heyghen, supra*, p. 248-9) acts of the sort complained of on the part of defendants here were, at the time they are alleged to have taken place, and prior to December 1938 'unlawful under the laws of the Reich itself,' the place of the tort." (p. 7)

The *Bernstein* litigation did not seek to found subject matter jurisdiction upon 28 U.S.C. §1350, but rather relied upon diversity of citizenship under 28 U.S.C. §1332(a)(2). *Bernstein* v. *N.V. Nederlandsch- nerikaansche, etc.*, 6 F. R.D. 297, 301 (S.D.N.Y. 1946)

The Supreme Court held in *Sabbatino* that the Act of State doctrine was a principle of "federal-court-built law" (376 U.S. p. 426), a "principle of decision binding on federal and state courts alike but compelled neither by international law nor by the Constitution," although it has "Constitutional underpinnings." (376 U.S. at p. 427).

In the view of the Supreme Court, the unjustified expropriation of property of nationals of the expropriator, without compensation, is not universally regarded as a violation of international law, especially not by communist and third-world nations, and therefore is an issue too unsettled and sensitive to be passed upon by the federal courts. The Court held that it was applying the Act of State doctrine to the case before it, based upon considerations applicable to the particular case only, rather than fashioning a rule of general applicability precluding examination by the federal courts of every kind of act of state. The "relevant considerations" on which it based its holding were:

1. the property confiscated was located within the territory of the foreign sovereign;

2. the foreign sovereign was extant and recognized by this country at the time of the Court's decision;

3. there was no treaty or other clear agreement as to controlling legal principles, even though it was alleged that the taking violated international law (376 U.S. at p. 428).

The Court indicated that it might not apply the Act of State doctrine where international law was clear, or where the implications of a decision on the merits were less important to United States foreign relations. The Court also stated (p. 428):

> "The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered."

The majority in *Sabbatino* carefully expressed no opinion on the "Bernstein exception" because the Department of State had not communicated to the Court its position on the applicability of the Act of State doctrine to the Cuban expropriations. The Court stated that it did not intend to set forth an inflexible rule requiring application of the doctrine. Rather, because the Act of State doctrine is a principle of federal law subject to re-examination depending upon the circumstances of each case, the Court could and might now decide the *Bernstein* case differently from the Second Circuit decision *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954). See also, *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. denied* 332 U.S. 772.

In *Sabbatino*, the Supreme Court was concerned that a decision by the federal courts that a taking by a foreign country was invalid and contrary to international law would be an affront to the expropriating country and might prejudice efforts by the Executive Branch to achieve redress through diplomatic means. The reasons underlying the doctrine, as stated by Mr. Justice White in dissent in *Sabbatino* are

> "an effort to maintain a certain stability and predictability in transnational transactions, to avoid friction between nations, to encourage settlement of these disputes through diplomatic means and to avoid interference with the executive control of foreign relations." 376 U.S. at p. 447.

With these objectives Mr. Justice White had no dispute, although he disagreed with the method chosen by the majority to implement those objectives. Mr. Justice White pointed out that these considerations do not apply in a Nazi confiscation case. Confiscations by the Nazis such as those involved in *Bernstein*

> "had been condemned in multinational agreements and declarations as crimes against humanity. The acts could thus be measured in local courts against widely held principle rather than judged by the parochial views of the forum." 376 U.S. p. 457, fn.18

One of the main reasons the Court gave for its hesitation to inquire into the Cuban confiscations was the lack of international agreement as to the legality of the taking without adequate compensation, which, as Mr. Justice White pointed out, does not exist in a "Bernstein" case.

In *Banco Nacional de Cuba* v. *First National City Bank*, 431 F.2d 394 (2d Cir. 1970) the Court of Appeals applied the Act of State doctrine to bar a counterclaim for moneys First National held in excess of the proceeds realized from its sale of collateral securing a loan made to the Cuban bank. First National claimed the excess should be applied

as a set-off in payment for First National branches expropriated by the Castro government. The Second Circuit held the Act of State doctrine precluded assertion by First National of its counterclaim.

When the case reached the Supreme Court for the first time, the Department of State wrote a "Bernstein letter" to that Court, expressing its view that "the foreign policy interests of the United States do not require the application of the Act of State doctrine to bar adjudication of the validity of defendant's counterclaim or set-off against the Government of Cuba in these circumstances." (Quoted at 442 F.2d p. 532).

The Supreme Court vacated the judgment of the Second Circuit and remanded for reconsideration in view of the State Department's letter. On remand, the Second Circuit adhered to its view, stating that:

> "First National City's arguments are based wholly on the assumption that the so-called *Bernstein* exception to the Act of State doctrine applies here since the State Department has written a letter. We feel that that assumption is erroneous. *Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts." 442 F.2d p. 534.

Among the "unique circumstances" cited by the Second Circuit was the fact that the United States had gone to war with Nazi Germany, that government was no longer in existence, and the kind of acts of which Bernstein complained had been comdemned throughout the world as crimes against humanity. The Second Circuit also quoted

from the Solicitor General's *amicus curiae* brief in the *Sabbatino* case:

> "The circumstances leading to the State Department's letter in the Bernstein case were, of course, most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of the State Department's letter. Moreover, the principle of payment of reparations by the successor German government had already been imposed . . . so that there was no chance that a suspension of the act of state doctrine would affect the n tiation of a reparations settlement." 442 F.2d p. 534.

When *First National City* again was before the Supreme Court, the Second Circuit was reversed and the case remanded. Three justices framed the issue as follows (406 U.S. p. 764):

> "The question that we must now decide is whether the so-called Bernstein exception to the act of state doctrine should be recognized in the context of the facts before the Court."

It is apparent throughout the opinions in *First National* that the phrases *"Bernstein exception"* and "Bernstein letter" are being used in a generic sense. The Court uses the term "Bernstein letter" to mean any letter written by the Department of State in any case, purporting to relieve the federal courts of the restraint upon the exercise of their jurisdiction which would result from application of

the Act of State doctrine. The Court uses the term "Bernstein exception" to mean an exception to the general applicability of the doctrine in an expropriation case which results from the issuance in any such case of a "Bernstein letter."

When Justices Rehnquist, White and the Chief Justice state that:

> "we . . . adopt and approve the so-called Bernstein exception to the Act of State doctrine." 406 U.S. p. 768

they are merely stating their view of the law, that

> "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the Act of State doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." 406 U.S. p. 768

Likewise, when Justices Brennan, Stewart, Marshall and Blackmun, in dissent, state:

> "The Court today reverses the judgment of the Court of Appeals for the Second Circuit which declined to engraft the 'Bernstein' exception upon the act of state doctrine. . . . The Court, nevertheless, affirms the Court of Appeals' rejection of the 'Bernstein' exception. Four of us in this opinion unequivocally take that step, as do Mr. Justice Douglas and Mr. Justice Powell in their separate opinions concurring in the result of the judgment." 406 U.S. p. 776-777

it is equally apparent that they are using the term "Bernstein exception" in a generic sense. In essence, the four dissenters would re-affirm the *Sabbatino* case. In footnote 1 to the dissent (400 U.S. p. 776), the dissenters note that the Bernstein exception has been an exceedingly narrow one and was successfully applied only in the original Bernstein case. There is no indication in the dissenting opinion that the dissenters would refuse to apply the Bernstein exception if they were reviewing the Bernstein case or a case arising out of Nazi confiscations. The dissent quotes extensively from *Sabbatino,* including that portion of the opinion which states that if a government no longer exists, the Court might view the case differently.

Mr. Justice Brennan interprets *Sabbatino* as having held that in certain circumstances the validity of a foreign act of state is a "political question," quoting (406 U.S. p. 788, fn. 11) from *Baker* v. *Carr,* 369 U.S. 186, 211-212 (1962) the criteria by which the Court is to decide whether a case involves a political question the courts should abstain from deciding. Applying those standards, Mr. Justice Brennan concludes that the Cuban expropriation is a political question, based on the following factors:

> "[T]he absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban government, the sensitivity of the issue to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens. . . ." 406 U.S. p. 788

Mr. Justice Brennan believes a letter from the State Department suggesting that the Act of State doctrine need

not be applied is only one factor the Court must consider. He observes (406 U.S. p. 788, fn. 12) that a comparison of *First National* with *Bernstein* reinforces his conclusion, because, as the Government itself acknowledged, *Bernstein* was "a most unusual" case. Mr. Justice Brennan concludes, therefore, that

> "the result, though not the rationale, in Bernstein may be defensible." 406 U.S. p. 789, fn. 12 cont'd.

Mr. Justice Brennan stresses, as was held in *Sabbatino*, that a letter from the State Department may be considered by the federal courts as they shape the Act of State doctrine, but the courts cannot abdicate their responsibility to decide each case as it arises: "Representations from the Department of State are entitled to weight . . . but they cannot be determinative." 406 U.S. p. 790. Otherwise, as Mr. Justice Douglas points out:

> "The Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not other's." 406 U.S. p. 773

It is clear, therefore, that only three members of the Court hold to the view that a "Bernstein letter" from the State Department decides the issue of applicability of the Act of State doctrine. The four dissenters and Mr. Justice Douglas are of the opinion that each case should be determined on its merits, applying the criteria set forth in *Sabbatino* and re-affirmed by a majority of the Court in *First National City*. It is possible, as plaintiff suggests, that the instant case is sufficiently different from the Cuban expropriation cases so that the Supreme Court would not

apply the Act of State doctrine, since at least two of the major considerations in those cases do not exist here: The Nazi German government no longer exists, and confiscations similar to those alleged in this case have been universally condemned (though not by the Nurnberg Tribunal as war crimes, as previously pointed out). This Court is of the opinion, nevertheless, as stated in its May 20, 1974 decision, that the law at present is that stated in the first *Bernstein* case, *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947), *cert. den.*, 332 U.S. 772. We need not, however, rest our decision on this ground, since for the reasons stated above, the complaint fails to state a claim cognizable in this Court.

The defendant's motion is granted, and the amended complaint is dismissed.

Settle a final judgment on notice which shall provide that the bond to secure our order of February 5, 1974 vacating the attachment shall not be discharged or exonerated pending appeal.

Dated: New York, New York
January 2, 1975

CHARLES L. BRIEANT, JR.
U.S.D.J.

Opinion of Court of Appeals dated April 6, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 194—September Term, 1975.

(Argued December 11, 1975 Decided April 6, 1976.)

Docket No. 75-7135

WILLY DREYFUS,

Plaintiff-Appellant,

v.

AUGUST VON FINCK and MERCK, FINCK & Co.,

Defendants-Appellees.

Before:

OAKES, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Charles L. Brieant, *Judge,* dismissing plaintiff's amended complaint for failure to state a claim upon which relief can be granted.

Affirmed.

ERIC SCHNAPPER, New York, N. Y. (John R. Horan, New York, N. Y., of Counsel), *for Appellant.*

WILLIAM SCHURTMAN, New York, N. Y. (Walter, Conston, Schurtman & Gumpel, P.C., New York, N. Y., Alan Kanzer, of Counsel), *for Appellees.*

Opinion of Court of Appeals dated April 6, 1975

VAN GRAAFEILAND, *Circuit Judge:*

The judgment appealed from dismissed the complaint of a Swiss citizen and resident seeking recovery from West German citizens and residents for allegedly wrongful confiscation of property in Nazi Germany in 1938. The action was commenced in the Southern District of New York in 1973 by attaching certain of defendants' assets in New York City.

Plaintiff, a Jew and former resident of Germany, was forced to emigrate from that country to Switzerland and sold defendants his interest in the banking firm of J. Dreyfus & Co., allegedly under duress and at a price which was one and one-half million dollars below its actual value. Following World War II, plaintiff sought additional compensation from the defendants, and, in 1948, settlement was agreed upon. This settlement was never consummated, allegedly because of wrongful repudiation by defendants; and plaintiff then sought relief in a Restitution Court, or "Chamber", established under the aegis of the United States Military Command in Germany. In 1951, while the decision of this tribunal was on appeal in the Court of Restitution Appeals, a second settlement agreement was reached in open court; and plaintiff's petition was thereupon dismissed. The consideration recited in this agreement, four hundred ninety thousand German marks, was paid.

Plaintiff predicated his cause of action below upon both the original taking of his property and defendants' alleged repudiation of the 1948 settlement agreement. He alleged the existence of Federal jurisdiction under 28 U.S.C. § 1332 upon an asserted diversity of citizenship, and under 28 U.S.C. §§ 1331 and 1350 because defendants' conduct al-

legedly violated four treaties or pacts to which the United States was a party or adherent—the Hague Convention,[1] the Kellogg-Briand Pact,[2] the Versailles Treaty[3] and the Four Power Occupation Agreement.[4]

Defendants promptly moved pursuant to Fed. R. Civ. P. 12(b) to dismiss the complaint, asserting, among other grounds, lack of subject matter jurisdiction.[5] The parties conceded on oral argument that there was no diversity of citizenship under § 1332. However, the District Court held that, because a colorable claim was made under the above mentioned treaties, it had jurisdiction under §§ 1331 and 1350 to determine whether the complaint stated a cause of action on which it could grant relief. The District Court then ordered the complaint dismissed, because none of the treaties relied upon by plaintiff conferred upon him any personal right of recovery and because the "Act of State" doctrine precluded the court from inquiring into the alleged forceful transfer of plaintiff's property to defendants.

Plaintiff moved for reargument and rehearing pursuant to Rule 9(m) of the General Rules of the Southern District, contending that he had not had an opportunity to brief

1 Hague Convention No. IV of October 18, 1907, 36 Stat. 2277.

2 Kellogg-Briand Peace Pact, 46 Stat. 2343 (1928).

3 Although President Wilson submitted the Treaty of Versailles to Congress for approval, S. Doc. 49, 66th Cong., 1st Sess. (1919), it was not ratified and consequently when the Treaty became effective on January 10, 1920 the United States was not a party thereto. It was not until August 25, 1921 that the United States finally established friendly relations with Germany. 42 Stat. 1939 (1921).

4 "Agreement on Central Machinery in Germany", 5 U.S.T. 2062 (1945).

5 Other grounds relied upon were lack of personal jurisdiction and *forum non conveniens*. Disposition on these grounds was deferred without prejudice. Defendants also state that, should they be required to answer the complaint, they will interpose affirmative defenses of payment, release, settlement, accord and satisfaction, statute of limitations and laches.

and argue the sufficiency of his complaint and that the Act of State doctrine, not having been raised as a defense, should not have been considered. This motion was granted, and the District Court's original decision was modified on reargument to permit plaintiff to file an amended complaint setting forth the specific provisions of the several treaties upon which plaintiff based his claim. An amended complaint was served on July 24, 1974, and defendants moved again to dismiss.

The District Judge, in a memorandum opinion dated January 2, 1975, reviewed the several treaties in greater detail and again concluded that no private right of recovery for defendants' allegedly tortious conduct was provided for in any of them. He also reviewed the recent decisions of this Court and of the Supreme Court dealing with the Act of State doctrine[6] and the so-called "*Bernstein* exception" and concluded that Judge Learned Hand's opinion in *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947),[7] continued to state the correct application of that doctrine. The District Judge did not, however, rest his January 2 decision on that doctrine, because he felt that the complaint failed to state a claim on which relief could be granted.

6 *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947); *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972).

7 Judge Hand said that ". . . a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such." 163 F.2d at 249. At the time of the second *Bernstein* decision, *supra*, 210 F.2d at 375, the Court was in receipt of a letter from the United States State Department relieving it from any restraint upon the exercise of its jurisdiction to pass upon the validity of the acts of Nazi officials. This has become known as the "*Bernstein* exception" to the Act of State doctrine.

Notice of appeal to this Court was served on February 18, 1975. On May 15, 1975, plaintiff moved to have the case remanded to the District Court because his attorney, in preparing the brief on appeal, had concluded that Military Law 59, "Restitution of Identifiable Property", 12 Fed. Reg. 7983 (1947), promulgated by the American Military Government in Germany, might furnish an additional basis for jurisdiction in the District Court. On the argument of the motion, defendants' counsel stipulated that in the interest of having a prompt disposition of his appeal, defendants would not object if this Court also considered plaintiff's supplemental contentions concerning Military Law 59.

The Question of Jurisdiction

The District Court held that it had subject matter jurisdiction to consider plaintiff's treaty-based claims, because plaintiff's right to recover "will be sustained if the treaties of the United States are given one construction and will be defeated if they are given another." This analysis was proper. Section 1331 provides that the District Courts shall have jurisdiction in cases involving more than ten thousand dollars which arise "under the Constitution, laws or treaties of the United States." Section 1350 provides for such jurisdiction in any civil action by an alien for a tort "in violation of the law of nations or a treaty of the United States." While these provisions do not create a cause of action for a plaintiff seeking recovery under a treaty, they do give the District Court power to determine whether, in a well pleaded complaint, a cause of action exists. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Bell* v. *Hood*, 327

U.S. 678, 682 (1946). *Cf. Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974).

Where, however, a plaintiff's allegation of jurisdiction is so attenuated and insubstantial as to be absolutely devoid of merit, a District Court may refuse jurisdiction. *Bell* v. *Hood, supra*, 327 U.S. at 682-83. Plaintiff's claim under Military Law 59, as distinguished from his treaty claims, falls within this category. This "law" was promulgated by the American Military Government of occupied Germany on November 10, 1947, at a time when the United States was still officially at war with that country.[8] Its stated purpose was:

> [T]o effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology, or political opposition to National Socialism. Military Law 59, Art. 1(1).

A claimant under this act would file a petition with a Central Filing Agency which would forward it to an appropriate Restitution Agency for attempted adjustment. *Id.*, Arts. 55, 62. If the matter could not be compromised, it was then referred to the Restitution Chamber, a three-judge court which held hearings and rendered written opinions. *Id.*, Arts. 64, 66, 68. Appeals from the Chamber originally went to a Board of Review, Art. 69, but in 1950 this was replaced by the Court of Restitution Appeals. 15 Fed. Reg. 1547 (1950). Decisions of the Court of Restitution Appeals were final and not subject to further review. 15 Fed. Reg. 1548 (1950).

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8 The war between the United States and Germany was not officially terminated until October 19, 1951. Joint Res. Oct. 19, 1951, c. 519, 65 Stat. 451.

Traditionally, the "laws" of the United States within the meaning of § 1331 are statutory in origin. *The Fair* v. *Kohler Die and Specialty Co.*, 228 U.S. 22, 25 (1913); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 249, although the Supreme Court has in recent years broadened the definition of this term to include claims founded upon federal common law. *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 100 (1972). United States Military Commissions and Occupation Courts generally have no statutory existence. *Madsen* v. *Kinsella,* 343 U.S. 341, 347 (1952); *In Re Yamashita,* 327 U.S. 1, 19 n. 7 (1946). The President has extensive power to set up special tribunals in occupied foreign lands, and they are considered arms of the Executive. *Rose* v. *McNamara,* 375 F.2d 924, 927 (D.C. Cir. 1967). As stated in 1 Moore's Federal Practice ¶ 0.5[3.-1], at 141, "military commissions with their flexible jurisdiction are largely unfettered instruments of the executive branch of government and the President as Commander in Chief." In times of war, executive decisions are generally political and military in nature, and neither judicially manageable nor reviewable. *United States* v. *Shaughnessy,* 177 F.2d 436 (2d Cir. 1949), *cert. denied,* 338 U.S. 948 (1950); *DaCosta* v. *Laird,* 448 F.2d 1368, 1370 (2d Cir. 1971) (per curiam), *cert. denied,* 405 U.S. 979 (1972); *Atlee* v. *Laird,* 347 F.Supp. 689 (E.D. Pa. 1972), *aff'd by order,* 411 U.S. 911 (1973). The fact that this executive authority is exercised by the President through others does not transmute it into judicially reviewable action. *Ludecke* v. *Watkins,* 335 U.S. 160, 165 (1948).

Even in peace time, Executive Orders issued without statutory authority providing for presidential implementation are generally held not to be "laws" of the United States. *Stevens* v. *Carey,* 483 F.2d 188 (7th Cir. 1973); *National Ass'n of Internal Revenue Employees* v. *Dillon,*

356 F.2d 811 (D.C. Cir. 1966); *Manhattan-Bronx Postal Union* v. *Gronouski,* 350 F.2d 451 (D.C. Cir. 1965), *cert. denied,* 382 U.S. 978 (1966); *McDaniel* v. *Brown & Root, Inc.,* 172 F.2d 466 (10th Cir. 1949); *Crabb* v. *Welden Bros.,* 164 F.2d 797 (8th Cir. 1947); *Sweet* v. *B. F. Goodrich Co.,* 68 F.Supp. 782 (N.D. Ohio 1946), *appeal dismissed on other grounds,* 174 F.2d 1022 (6th Cir. 1949) (per curiam); *Lodge 1647 and Lodge 1904 American Fed. of Gov't Employees* v. *McNamara,* 291 F.Supp. 286 (M.D. Pa. 1968); *Canal Zone Central Trade Labor Union* v. *Fleming,* 246 F.Supp. 998 (D.C. Canal Zone 1965), *rev'd on other grounds,* 383 F.2d 110 (5th Cir. 1967).

Military Law 59 created its own regulations and its own tribunals to interpret and enforce them. It was completely self-contained. Nowhere did it provide for proceedings in a U.S. District Court, which has only such jurisdiction as is conferred upon it by statute. *Goldlawr, Inc.* v. *Heiman,* 288 F.2d 579, 582 (2d Cir. 1961), *rev'd on other grounds,* 369 U.S. 463 (1962). Its provisions had no general applicability but were peculiarly concerned with the problems of occupied Germany and its people. *Cf. Puerto Rico* v. *Rubert Hermanos Co.,* 309 U.S. 543, 550 (1940). It did not create a cause of action in favor of the plaintiff which can be enforced in a U.S. District Court. *See American Well Works Co.* v. *Layne and Bowler Co.,* 241 U.S. 257, 260 (1916). Neither is there any basic controversy concerning its provisions. *See Gully* v. *First Nat'l Bank,* 299 U.S. 109, 118 (1936).

Plaintiff's Treaty Rights

A United States treaty is a contract with another nation which under art. VI, cl. 2 of the Constitution becomes a law of the United States. *United States* v. *Reid,* 73 F.2d 153, 155 (9th Cir. 1934), *cert. denied,* 299 U.S. 544 (1936). It may also contain provisions which confer rights upon the

citizens of one of the contracting parties which are capable of enforcement as are any other private rights under the law. *Z. & F. Assets Realization Corp.* v. *Hull,* 114 F.2d 464, 470 (D.C. Cir. 1940), *aff'd,* 311 U.S. 470 (1941). In general, however, this is not so. Brownlie, *The Place of the Individual in International Law,* 50 Va. L. Rev. 435, 440 (1964). Rarely is the relationship between a private claim and a general treaty sufficiently direct so that it may be said to "arise under" the treaty as required by art. III, § 2, cl. 1 of the Constitution. 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3563, at 424 (1975).

It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights. *Foster* v. *Neilson,* 27 U.S. 253 (1829); *Edye* v. *Robertson* (Head Money cases), 112 U.S. 580 (1884); *Z. & F. Assets Realization Corp.* v. *Hull, supra,* 114 F.2d at 471; *Camacho* v. *Rogers,* 199 F.Supp. 155, 158 (S.D.N.Y. 1961); *Pauling* v. *McElroy,* 164 F.Supp. 390 (D.D.C. 1958), *aff'd,* 278 F.2d 252 (D.C.Cir. 1960), *cert. denied,* 364 U.S. 835 (1960); *Saipan* v. *United States Dep't of Interior,* 356 F.Supp. 645, 660 (D.Hawaii 1973). *Cf. Hidalgo County Water Control and Improvement Dist.* v. *Hedrick,* 226 F.2d 1, 7 (5th Cir. 1955), *cert. denied,* 350 U.S. 983 (1956). Indeed, even where a treaty is self-executing, Federal jurisdiction under § 1331 will not lie where it is not provided for in the treaty. *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798, 802 (2d Cir. 1971).

We see no necessity for reviewing in detail the several treaties relied upon by plaintiff. Plaintiff was permitted to file an amended complaint specifying the particular treaty provisions upon which he based his claim. We find no error in the District Court's findings that none of these dealt with the expropriation by Germans of the property of Ger-

man citizens, and none conferred any private rights with regard to such property which were enforceable in American courts. The Hague Convention attempted to impose standards of conduct for belligerent nations. The Kellogg-Briand Pact was a declaration renouncing war as an instrument of national policy. The Treaty of Versailles was a reparations and war crimes compact following World War I. The Four Power Occupation Agreement provided for the joint occupation and control of Germany by the conquering nations during the period of surrender.

Treaty provisions similar to those involved herein have been relied upon by other plaintiffs with a singular lack of success. In *Hamilton* v. *Regents of the University of California,* 293 U.S. 245 (1934), plaintiffs challenged a California law which required university students to take a course in military science and tactics, relying in part upon the provisions of the Kellogg-Briand Pact. The Court stated that this contention required "little consideration" and found no conflict between the statute and the provisions of the treaty. *Id.* at 265. In *Pauling* v. *McElroy, supra,* the court held that the provisions of the Charter of the United Nations and the Trusteeship Agreement for the Trust Territory of the Pacific Islands were not self-executing and did not vest plaintiffs with individual legal rights. *Camacho* v. *Rogers, supra,* and *United States* v. *Vargas,* 370 F.Supp. 908, 915 (D. Puerto Rico 1974), dealt with the United Nations Charter in the same manner.

We conclude that the District Court was correct in holding that no private right of action could be based on the four treaties referred to in plaintiff's complaint.

The Law of Nations

As pointed out above, 28 U.S.C. § 1350 provides in part that District Courts shall have jurisdiction of an action by

an alien for a civil tort committed in violation of the law of nations. Plaintiff argues that the seizure of his property and defendants' allegedly wrongful repudiation of the 1948 settlement agreement were torts which violated the law of nations. We disagree.

There has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase. *Khedivial Line, S.A.E.* v. *Seafarers' International Union,* 278 F.2d 49, 52 (2d Cir. 1960) (per curiam); *Valanga* v. *Metropolitan Life Ins. Co.,* 259 F. Supp. 324, 327 (E.D.Pa. 1963). There is a general consensus, however, that it deals primarily with the relationship among nations rather than among individuals. "It is termed the Law of Nations—or International Law—because it is relative to States or Political Societies and not necessarily to individuals, although citizens or subjects of the earth are greatly affected by it." von Redlich, *The Law of Nations,* 5 (2d ed. 1937).[9] In *Khedivial, supra,* 278 F.2d at 52, we said: "Plaintiff has presented no precedents or arguments to show either that the law of nations accords an unrestricted right of access to harbors by vessels of all nations or that, if it does, this is a right of the foreign national rather than solely of the nation."

Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights. *Pauling* v. *McElroy, supra,* 164 F.Supp. at 393. It has been held inapplicable to torts such as unseaworthiness of a vessel and failure to provide a seaman with a safe place to work, *Damaskinos* v. *Societa Navigacion Interamericana, S.A., Panama,* 255 F.Supp. 919, 923 (S.D.N.Y. 1966), and to the right of a Russian

9 Kent defined the law of nations as "that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other." 1 Kent Commentaries, 1 (1st ed. 1826). *See also* Brierly, *The Law of Nations,* 1 (6th ed. 1963).

citizen to recover the proceeds of a life insurance policy. *Valanga* v. *Metropolitan Life Ins. Co., supra.*

More importantly for purposes of this lawsuit, violations of international law do not occur when the aggrieved parties are nationals of the acting state. This was pointed out by Mr. Justice White in his dissenting opinion in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 441-442 (1964), and it is the clear holding in *Salimoff & Co.* v. *Standard Oil Co.,* 262 N.Y. 220 (1933), cited by both the majority and dissenting opinions.[10]

In the instant case, plaintiff was a citizen and resident of Germany at the time of defendants' alleged wrongdoing. Moreover, his complaint did not allege that defendants played any role in the policymaking decision of the German government. Defendants' conduct, tortious though it may have been, was not a violation of the law of nations, which governs civilized states in their dealings with each other.

Inasmuch as the District Court was correct in holding that plaintiff's complaint failed to state a cognizable claim upon which relief could be granted, we need not consider the parties' contentions concerning the "Act of State" doctrine which was not relied upon by the District Court.

The judgment appealed from is affirmed.

OAKES, *Circuit Judge* (concurring):

I concur in the result.

10 In *Salimoff,* the New York Court of Appeals said: "According to the law of nations [Soviet Russia] did no wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants." 262 N.Y. at 227.